



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

MAR 11 2005

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

**SUBJECT:** Joint Collection of Penalties with State and Local Governments and Federally Recognized Indian Tribes

**FROM:** Thomas V. Skinner *TVS*  
Acting Assistant Administrator

**TO:** Regional Administrators, Regions I-X

This memorandum replaces the October 30, 1985 memorandum entitled the "Division of Penalties with State and Local Governments" and provides further guidance with respect to cases involving federally recognized Indian tribes.<sup>1</sup> The 1985 guidance implemented the 1984 "Policy Framework for State/EPA Enforcement Agreements," which stated that EPA should arrange for penalties to be shared with states in enforcement actions where permitted by law. This guidance clarifies that the policy of penalty division with states and local governments also applies, where appropriate, to cases involving federally recognized tribes.

As independent governmental entities, tribes can be entitled to penalties under their inherent sovereign powers or authorities delegated by Congress. In fact, many environmental statutes provide for treatment of tribal governments in the same manner as state governments.<sup>2</sup>

EPA generally encourages state, local and tribal participation in federal environmental enforcement actions. State and local governments and federally recognized tribes may share in civil penalties that result from their participation, to the extent that it is permitted by federal, state, local, and tribal law, and is appropriate under the circumstances of the individual case.

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<sup>1</sup> "Indian tribe" means an Indian tribe, band, nation, pueblo, community, or Alaska Native Village that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a. Maintained by the Department of the Interior, the list of federally recognized tribes is updated periodically and published in the Federal Register.

<sup>2</sup> See e.g., Federal Water Pollution Control Act, 33 U.S.C. § 1377(e); Clean Air Act, 42 U.S.C. § 7601(d); Safe Drinking Water Act, 42 U.S.C. § 300j-11; and Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9626(a).

Penalty division advances federal enforcement goals by:

- encouraging states and tribes to develop and maintain active enforcement programs; and
- enhancing federal, state and tribal cooperation in environmental enforcement.

However, penalty division must be undertaken consistent with the Miscellaneous Receipts Act, 31 U.S.C. § 3302, which, with certain exceptions,<sup>3</sup> requires that funds properly payable to the United States must be paid to the U.S. Treasury. Thus, as a general matter, the United States may not direct penalties collected under its own authorities to another governmental agency. Therefore, in penalty sharing cases:

- The state, local or tribal government must have and assert an independent claim under federal, state or tribal law that supports its entitlement to civil penalties.<sup>4</sup> If the entire basis of the litigation is the federal enforcement action, then the entire penalty is due to the federal government.
- The state, local or tribal government must have the authority to seek the full amount of civil penalties received. A state, local or tribal government is ineligible to share in penalties beyond its statutory limit.
- The state, local or tribal government should have participated in developing or prosecuting the case.

As in any other court-ordered assessment of penalties under the statutes administered by EPA, advance coordination and approval of penalty actions with the Department of Justice is required. Similarly, the Department of Justice will not agree to any penalty actions without advance concurrence from the Office of Enforcement and Compliance Assurance. Therefore, Regions should consult with the appropriate Headquarters enforcement personnel before any arrangement for joint penalty action is made.

In a proposed consent decree, the penalties should be collected based on the level of participation and the penalty assessment authority of the state, local or tribal government. The penalty amounts collected by each government should reflect a fair apportionment based on the technical and legal contributions of the participants, within the limits of each participant's statutory entitlement to penalties. The subject of penalty allocation is a matter for discussion among the governmental plaintiffs. It is inappropriate for the defendant to participate in such discussions.

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<sup>3</sup> For example, money the United States receives in trust for a tribe is not subject to the Miscellaneous Receipts Act. Regional offices should consult with appropriate regional attorneys or Headquarters offices in cases where this exception may be implicated.

<sup>4</sup> This guidance does not apply when a state, local government or tribe seeks remedies other than statutory penalties.

Please incorporate this guidance in all appropriate actions. Contact Rosemarie Kelley in OCEA's Office of Regulatory Enforcement (202-564-4014) with any questions in this regard.

cc: Thomas L. Sansonetti, Assistant Attorney General  
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